

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DIRECT MARKETING CONCEPTS, INC., et
al,

Defendants

CIVIL ACTION NO. 04-CV 11136GAO

AFFIDAVIT OF LUKE GOLJAN

I, LUKE GOLJAN, under oath declare as follows:

1. I have been working with ITV Direct, Inc. and Direct Marketing Concepts (collectively as "ITV") since October of 2002, when I began working as a videographer, subcontracted through Counter Productions. I have since become employed by ITV.

2. In May of 2005, I was promoted to Vice President of Television Production for ITV.

3. My duties as Vice President of Television Production include but are not limited to directing infomercials, managing pre- and post-production, editing the infomercials for content and compliance, and tape duplication.

4. I have read the Federal Trade Commission's motion to modify the June 24, 2004 Preliminary Injunction and have personal knowledge of the facts contained herein.

5. Since the Preliminary Injunction was entered we have followed strict guidelines for our direct response advertisements (“infomercials”/ “shows”), requiring that they feature specific disclaimers throughout the infomercials.

6. Every infomercial begins with a disclaimer that states:

“THE FOLLOWING IS A PAID ADVERTISEMENT FOR (PRODUCT)
BROUGHT TO YOU BY ITV.”

This disclaimer is both spoken and printed on a full screen for at least 5 seconds and is clearly and prominently displayed. If the show features an ingestible product, another disclaimer will follow that states: “THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.” This disclaimer is also both spoken and printed on a full screen and is just over 6 seconds long.

7. All shows also clearly and prominently display disclaimers three times throughout the infomercial for 5-10 seconds before each call to action and before any “800” number even appears on the screen. These disclaimers are either in 11-12 point bold Arial font or 14-15 point bold Impact font and appear either along the bottom of the screen within broadcast-legal areas or along the top of the lower third that contains the guest’s name.

8. These disclaimers appear before the show begins, within the first 30 seconds of the infomercial after the introduction has run, usually right as Donald Barrett introduces the show’s topic and before each call to action or instance where any “800” will first appear on screen.

9. In addition, I work closely with our legal counsel throughout the editing process, reviewing the shows for any moments that may require additional disclaimers to be added, as well as removing or editing content where needed. Shows we produce in-studio and shows we acquire from outside producers are reviewed in this manner for content and to assure all disclaimers are edited properly.

10. The FTC claims that our shows mimic a talk-show format and this format is somehow deceptive. This format is used by ITV to allow the guest time to cover the benefits of the product and combat possible objections that may arise. This facilitates the sale process by allowing prospective customers to know whether or not they would likely enjoy the product before they even pick up the phone. Other infomercials that rely on a combination of stock footage, actual footage shot for the product, voice-over work and flashy graphics cannot address all of the issues prospective customers might have when they call in as effectively as a 28:30 interview can. There is nothing deceptive in creating a show where two people discuss a topic and or product and offer the viewer an opportunity to receive more information or purchase a product.

11. Television talk shows do not specifically sell or recommend products. Guests on talk shows may endorse a particular brand of product, but they do not make it available for sale with an “800” number. Thus, our format differs from an actual talk show. Numerous other companies have adopted this format as well, making it an established infomercial format commonly seen by the public and with which viewers are familiar.

12. No other format of show utilizes disclaimers throughout the program such as those required by ITV. Through the use of these disclaimers, these shows also address

the concern raised by many television stations broadcasting the program that the opinions of the guest are not those of the station. Thus, it is quite common for certain stations to require additional disclaimers in order for paid advertisements to run on their networks. ITV readily adds these disclaimers as well if requested.

13. In addition, our programs (as well as other infomercials) are never listed as anything other than “Paid Programming” by networks or TV guides. Viewers cannot check the listings to find out when “ITV” will be on the air and we do not maintain any sort of accessible schedule that could be construed as airtimes for a TV show. With the introduction of digital cable into many households across the United States, many televisions include a superimposed graphic listing the station and program on the top or bottom of the screen for a few moments once the viewer changes to that particular station. In many instances, the station itself provides its own disclaimer by listing it as “Paid Programming.”

14. Donald Barrett routinely refers to our set as the “Larry King Live” set due to the fact that Larry King is very well known and highly-respected television personality. When describing our set, it makes perfect sense to refer to it as a ‘Larry King Live’ set because most everyone has seen that program and can immediately identify what the set looks like. Claiming that Donald Barrett’s description of the set implies that we intend to deceive viewers is untrue. It is simply a set design term. We recently created a set that I personally dubbed “The View” set so that set designers would have an idea of what I was looking for in terms of furniture and set decoration. At no point did we ever intend to pass off our show as a similar program or deceive viewers into believing the show is anything but paid advertising.

15. Unlike traditional talk show interviews in which the host has a predetermined list of questions which the interviewee is aware of, that is not the case of our shows. Donald Barrett believes that an unscripted interaction between himself and the guest is important. Specifically, in the case of Sea Vegg, Scott Kennedy was unaware that Donald Barrett was going to ask him many of the questions that made it into the finished show.

16. In addition, during the production of our infomercials, the host and guest may begin conversing on something neither had expected and we may determine that content to be valuable, based on its spontaneity and the fact that it specifically comes across as real and unrehearsed. We always strive for realistic interaction between the host and guest during the interview. A carefully rehearsed script would not provide the level of realism possible by simply asking the guest a question and allowing them to respond in their own words. At the conclusion of the initial interview, additional footage is often shot in order to allow the guest to streamline their explanation or pinpoint exactly what the product is intended for, or to redo a portion not covered properly from a technical (TV production) standpoint.

17. The FTC's criticism of Donald Barrett's opening introduction for the infomercials is also odd, because nearly every show we create begins with similar wording, identifying first Donald Barrett as the host (which he is), then going on to introduce the topic they will be discussing, as well as the guest on the show and then stating that the show will be very controversial. Many of the topics are controversial and people watching the show are likely to have strong opinions about the guest's position, one way or the other.

AQUASANA

18. The Aquasana show is an example of the controversial nature of some of ITV's shows. On that show, Charles Strand makes mention of the sub-standard quality of America's tap water. Without question, viewers are likely to be upset when they realize that the United States Government allows certain levels of toxic chemicals to be introduced into our water supply, thus causing controversy.

19. Two versions of the Aquasana show were created. Both featured the same disclaimers. Aquasana Version 1 featured an L-Bar graphic, which dominates the left and bottom of the screen with information on the product. (See attached Exhibit 1) This L-Bar appears 9 ½ minutes into the show and remains up until it's conclusion except for 50 seconds when it becomes a lower third during a demonstration. There can be no mistaking this version of the show for anything other than an infomercial, as the L-Bar lists the product, offer and ordering info while Donald Barrett conducts the interview.

20. Aquasana Version 2 has a lower third with an "800" number that appears 13 minutes into the show and remains up for 10 minutes until the show becomes L-Bar format for the last 5 minutes. Though the number changes in size over the course of the show, it must always be clearly visible or the prospective customers would be unable to call in.

21. During both infomercials, we utilize both of our standard set of disclaimers labeling the show. The first appears at the start of the show: "THE FOLLOWING IS A PAID ADVERTISEMENT FOR AQUASANA BROUGHT TO YOU BY ITV."

22. As Donald Barrett introduces himself and the show's topic, another disclaimer appears on top of the lower third: "THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR AQUASANA."

23. Before the "800" number appears in either show, this disclaimer is repeated. Additionally, it is repeated before every call to action, even though the "800" number is already on screen. In Version 2 it appears before the L-Bar appears for the last 5 minutes.

24. Throughout the show there are also a variety of product shots displaying the item for sale along with the "800" number. The final moments of the show display only the product along with the L-Bar and offer. The show concludes with the following spoken and visible disclaimer:

"THE PRECEDING WAS A PAID ADVERTISEMENT FOR
AQUASANA BROUGHT TO YOU BY ITV."

REGENALIFE

25. Three versions of the Regenalife show were created, though only two were ever sent out to stations. The product offer was changed and various coverage of Donald Barrett was replaced with footage deemed more technically superior. Graphics were also updated.

26. With regard to Version 2 of the Regenalife show, the show begins with our standard disclaimer both in written form and spoken:

"THE FOLLOWING IS A PAID ADVERTISEMENT FOR
REGENALIFE BROUGHT TO YOU BY ITV."

This is followed by the FDA disclaimer that is both spoken and printed on screen:

“THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.”

In addition, as Donald Barrett introduces the show, a disclaimer appears atop the lower third:

“THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR REGENALIFE.”

27. During the course of the Regenalife show the “800” number on the bottom of the screen alternates between a large “800” number that appears during calls to action and remains up for a few minutes afterward and a small “800” number that remains up in between calls to action. The only time an “800” number is not on screen is in the minutes preceding the first call to action. Nine minutes and thirty seconds into the show, Dr. Duarte begins speaking about a study related to ORAC values and a graph appears on screen. This graph also contains a disclaimer that states:

“PRELIMINARY SHORT TERM SEVEN PERSON STUDY”

in order to adequately inform the consumer that the study mentioned was preliminary and small.

28. Eleven minutes thirty seconds into the show, another disclaimer appears, directly preceding the “800” number that comes up during the first call to action: “THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR REGENALIFE.”

29. Thirteen minutes into the show, Dr Duarte begins discussing what he believes to be a possible cause of diabetes and a FDA disclaimer appears atop the lower third: “THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.”

30. Twenty three minutes and forty seconds into the show, Dr Duarte again begins speaking about the study on ORAC values and the same disclaimer appears that appears earlier in the show: “PRELIMINARY SHORT TERM SEVEN PERSON STUDY.”

31. Before the final call to action, a disclaimer again appears atop the lower third: “THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR REGENALIFE.”

32. The show concludes with a full-screen disclaimer that is both spoken and printed stating: “THE PRECEDING WAS A PAID ADVERTISEMENT FOR REGENALIFE BROUGHT TO YOU BY ITV.” This is followed by the FDA disclaimer that is both printed and spoken: “THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.”

33. Regenalife Version 3 features technically superior coverage of Donald Barrett as well as updated graphics. While all the disclaimers remain the same as Regenalife Version 2, there are slight differences: The standard intro is altered slightly,

due to a change specified by the client: “THE FOLLOWING IS A PAID
ADVERTISEMENT FOR REGENALIFE BROUGHT TO YOU BY ALENA.”

34. The lower third does not appear during this show, thus disclaimers appear along the bottom of the screen. However, portions of the show that feature the “800” number require that the disclaimer be placed above the “800” number graphic so that they may be more readily visible.

35. The “800” number appears during each call to action and the last 5 minutes of the show, during which time a countdown timer reminds viewers of the time left in the program.

36. Dr. Duarte is now labeled as an “Alternative Health Care Expert” by a graphic on the bottom left of the screen that fades up and down twice throughout the program. The final 21 seconds of the show carry a full-screen graphic that states: “For more information on Regenalife, please call (“800” number)” The outro is also altered in the same manner as the intro: “THE PRECEDING WAS A PAID ADVERTISEMENT FOR REGENALIFE BROUGHT TO YOU BY ALENA.”

DR. DAY’S HOME JUICE BAR

37. Though two different versions of this show were created, both feature Donald Barrett specifically addressing the audience and stating that none of the statements within the infomercial have been approved by the FDA and that no product featured is intended to diagnose, treat or cure any disease along with our other standard disclaimers required by the Preliminary Injunction. There are also shots of the product and graphics on the screen that clearly indicate the show is a paid advertisement.

RENUVA

38. Renuva is a program that was produced by an outside studio. My first impression of it was that it is the most stereotypical infomercial that can be created. The FTC claims in its memorandum that the format is deceptive. However, this infomercial is complete with celebrity endorsements, a booming announcer, flashy graphics and lots of footage of people going about their lives with a smile on their face thanks to the product. The Renuva program is exactly what one would expect to see in an infomercial. There is nothing deceptive in this format whatsoever. A reasonable viewer could not possibly confuse the Renuva infomercial with any other type of program.

39. Like all shows we run, Renuva also carries opening and closing disclaimers, as well as 25 other disclaimers. When we received the infomercial, we added additional disclaimers. These disclaimers specify conditions under which studies were conducted and also provide additional information on some of the interviewee's relationship with Anti-Aging Systems, the company that owns the Renuva product. Most of these were added by us so as to properly inform the consumer and to avoid confusion. With this many disclaimers on the show, it is even more unlikely that a consumer could mistake it for any other type of program, since no other programs follow this format.

40. 1;00;00 (Start of show) (spoken/on screen) "The Following is a Paid Presentation for the Renuva Anti Aging System." The standard FDA disclaimer is underneath that clearly states: "THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE."

41. A list of the disclaimers which contained within the Renuva show clearly and prominently displayed and are as follows:

1;02;01 Doug Friesen-Member of Anti-Aging Formula, LLC.

1;04;17 Terry Lawler- Member of Anti-Aging Formula, LLC.

1;04;43 Individual Results may vary.

1;05;08 Individual Results may vary.

1;05;57 Frank Baker- Member of Anti-Aging Formula, LLC.

1;06;10 Paid presentation of Anti-Aging Formulas, LLC.

1;07;02 Most studies were conducted with medically prescribed injectable HGH.

1;08;25 Most studies were conducted with medically prescribed injectable HGH.

1;10;04 Tim Phillips- Member of Anti-Aging Formula, LLC.

1;10;54 Individual results may vary

1;10;59 Results may not be typical

1;11;22 Individual results may vary

1;11;44 Paid presentation of Anti-Aging Formulas, LLC.

1;12;35 Tim Phillips- Member of Anti-Aging Formula, LLC.

1;14;02 Results may not be typical

1;14;59 Individual results may vary

1;16;57 Most studies were conducted with medically prescribed injectable HGH.

1;18;37 Doug Friesen-Member of Anti-Aging Formula, LLC.

1;18;59 Daniel Trevor-Member of Anti-Aging Formula, LLC.

1;19;29 Paid Presentation of Anti-Aging Formulas, LLC.

1;20;22 Most studies were conducted with medically prescribed injectable HGH.

1;21;46 Most studies were conducted with medically prescribed injectable HGH.

1;23;13 Individual results may vary.

1;24;04 Frank Baker-Member of Anti-Aging Formula, LLC.

1;25;54 Terry Lawler- Member of Anti-Aging Formula, LLC.

1;26;40 Paid Presentation of Anti-Aging Formulas, LLC.

1;28;00 The preceding was a paid presentation for the Renuva Anti-Aging Systems.

The standard FDA disclaimer is underneath that and is both spoken and listed in print:

(spoken/on-screen) THESE STATEMENTS HAVE NOT BEEN EVALUATED BY
THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED
TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.

SEA VEGG

42. We created multiple versions of this infomercial, always with our standard disclaimers. In fact, we even removed one of the disclaimers because it was deemed it excessive and unnecessary (the disclaimer mentioned that the drug Paxil, which Scott Kennedy referred to, was a registered trademark). This is was in one of the first versions of the show and to my knowledge is no longer being aired in any markets.

43. The opening of all versions of the Sea Vegg show contains the following disclaimer in both written and spoken format: "THE FOLLOWING IS A PAID ADVERTISEMENT FOR SEA VEGG BROUGHT TO YOU BY ITV." This disclaimer is followed by a written and spoken FDA disclaimer: "THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE."

44. Before every call to action in the Sea Vegg show, prior to any “800” number appearing on screen, the following graphic appears: “THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR SEA VEGG.” Every show closes with the following spoken and written full screen disclaimer: “THE PRECEDING WAS A PAID ADVERTISEMENT FOR SEA VEGG BROUGHT TO YOU BY ITV.” “THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.”

45. I worked extensively on multiple re-edits of this program with our legal department to make sure that objectionable content was removed and or edited and the appropriate disclaimers were in place.

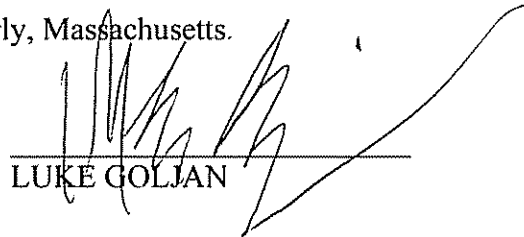
46. These updated versions were sent out to stations to replace previous versions. Great pains were taken to make sure the versions of Sea Vegg that were airing were only the versions that had been reviewed by legal counsel, included all appropriate and required disclaimers, provided information in the clearest way to potential consumers, and conformed to every possible standard we are required to fulfill.

47. I have enclosed true and accurate copies of all graphics in the above mentioned infomercials and disclaimers. (Collectively attached as Exhibit 1).

48. These graphics and disclaimers clearly indicate that we take the requirements of the Court’s Preliminary Injunction very seriously. These disclaimers and graphics also demonstrate that a reasonable consumer would not be confused about the format of our infomercials and would be well aware that they are paid advertising.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of June, 2005 in Beverly, Massachusetts.



LUKE GOLJAN